

Marcos (Migration) [2023] AATA 103 (4 January 2023)

DECISION RECORD

DIVISION:	Migration & Refugee Division
REVIEW APPLICANT:	Mr Said Marcos
VISA APPLICANT:	Mrs Hong Van Nguyen
REPRESENTATIVE:	Mr Fady Victor Zaki Awad
CASE NUMBER:	1916010
DIBP REFERENCE(S):	BCC2018/3985573
MEMBER:	Linda Holub
DATE:	4 January 2023
PLACE OF DECISION:	Sydney
DECISION:	The Tribunal remits the application for a Partner (Provisional) (Class UF) visa for reconsideration, with the direction that the visa applicant meets the following criteria for a Subclass 309 (Partner (Provisional)) visa: • cl.309.211 of Schedule 2 to the Regulations • cl.309.221 of Schedule 2 to the Regulations. •

Statement made on 4 January 2023 at 3:01pm

CATCHWORDS

MIGRATION – Partner (Provisional) (Class UF) visa – Subclass 309 (Partner (Provisional)) – genuine and continuing relationship – limited financial, household and social aspects of relationship while living in different countries – nature of commitment – validly married in home country – inconsistent information in visa application accepted as genuine mistake – consistent and plausible oral evidence, documentary evidence and supporting statements provided on review – sponsor’s age, health and requests for priority processing – decision under review remitted

LEGISLATION

*Migration Act 1958 (Cth), ss 5F(2), 65, 359AA
Migration Regulations 1994 (Cth), Schedule 2, cls 309.211(2), 309.221*

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of a decision made by a delegate of the Minister for Immigration on 14 June 2019 to refuse to grant the visa applicant a Partner (Provisional) (Class UF) visa under s.65 of the *Migration Act 1958* (the Act).
2. The visa applicant applied for the visa on 28 June 2018 on the basis of her relationship with her sponsor, the review applicant.
3. The delegate refused to grant the visa on the basis that the visa applicant did not satisfy cl.309.211(2) because after considering all the evidence in support of the application, the delegate did not believe it was sufficient in demonstrating the visa applicant was the spouse, as defined under s5F of the Act, of a person who is an Australian citizen.
4. The sponsor / review applicant appeared before the Tribunal on 16 December 2022 to give evidence and present arguments by video following a request from him for a video hearing as he was still recovering from an accident some months ago.
5. The Tribunal exercised its discretion to hold the hearing by video through the Microsoft Teams application. The Tribunal determined it was reasonable to hold a hearing in this manner, having regard to the nature of this matter and the individual circumstances of the applicant. The Tribunal also had regard to the Tribunal's objective of providing a mechanism of review that is fair, just, economical and quick, and the delay to the matter if the hearing was not to be conducted by telephone. No concerns were expressed by the applicant in regard to the hearing being conducted in this way nor was there any indication that he had any difficulty in understanding and responding to the questions being put. The Tribunal is satisfied that the applicant was given a fair opportunity to give evidence and present arguments.
6. The Tribunal also received oral evidence from the visa applicant via video. The Tribunal hearing was conducted with the assistance of interpreters in the Vietnamese, Arabic and English languages. The applicant's migration representative also attended the hearing by video.
7. For the following reasons, the Tribunal has concluded that the matter should be remitted for reconsideration.

BACKGROUND

8. The visa applicant is aged 56 years of age and was born in 1966 in Ho Chi Minh city, Vietnam and is a Vietnamese citizen. She declared no previous relationships and had no children.
9. The sponsor was born in El Minia Egypt in 1949 and is now 73 years of age. He became an Australian citizen by grant on 25 January 1986. In the sponsorship form, he declared one previous relationship. He was married in January 1981 and his wife passed away in 18 2012. He has three children from this marriage
10. The parties were married on 14 June 2018 and the marriage was registered at People's Committee of district 1 in Ho Chi Minh City, Vietnam. An additional Certificate of Marriage dated 30 June 2018 was provided, showing the parties were married according to the Rite of

the Roman Catholic Church in the Church Sr. Francis of Assisi Parish in Dakao, Ho Chi Minh City.

11. In 2017, the sponsor was in Vietnam between 17 March and 28 March and in 2018, he travelled there between 14 January and 31 January, 29 April and 18 July and between 11 September and 17 October 2018. He also travelled to Vietnam in 2019 including between 27 January and 9 March, 8 September and 7 October 2019. In 2020 he departed for Vietnam on 10 January 2020, returning to Australia 10 February 2020. He again travelled there on 8 April before returning to Australia on 9 May 2022 and again between 29 July and 5 September 2022.

RELEVANT LAW

Whether the parties are in a spouse or de facto relationship

12. At that time, Class UF contained only one subclass: Subclass 309 (Partner (Provisional)). The criteria for the grant of this visa are set out in Part 309 of Schedule 2 to the Migration Regulations 1994 (the Regulations). The primary criteria must be satisfied by at least one applicant. Other members of the family unit, if any, who are applicants for the visa need satisfy only the secondary criteria.
13. Clause 309.211(2) and 309.221 require that at the time the visa application was made, and at the time of this decision, the visa applicant is the spouse or de facto partner of an Australian citizen or Australian permanent resident or an eligible New Zealand citizen. In the present case the visa applicant claims to be the spouse of the review applicant who is an Australian citizen.
14. 'Spouse' is defined in s.5F of the Act and provides that a person is the spouse of another where the two persons are in a married relationship. Persons in a married relationship must be married to each other under a marriage that is valid for the purposes of the Act, there must be a mutual commitment to a shared life as a married couple to the exclusion of all others, the relationship must be genuine and continuing, and the couple must live together, or not live separately and apart on a permanent basis: s.5F(2)(a)-(d). In forming an opinion about these matters, regard must be had to all of the circumstances of the relationship. This includes evidence of the financial and social aspects and the nature of the visa applicant's and review applicant's household and their commitment to each other as set out in r.1.15A(3), which is extracted in the attachment to this decision. Each of the specific matters contained in r.1.15A(3) are effectively questions which must be answered: *He v MIBP*[2017] FCAFC 206.

Are the parties validly married?

15. If the parties are validly married, they may meet the requirements of a married relationship, but not a de facto relationship. The visa applicant provided the Department with a copy of a Socialist Republic of Vietnam Marriage Certificate, dated 14 June 2018 and registered at People's Committee of district 1, Ho Chi Minh City. On the evidence, the parties were married to each other under a marriage that is valid for the purposes of the Act as required by s.5F(2)(a).

CONSIDERATION OF CLAIMS AND EVIDENCE

16. The visa applicant provided limited information to the Department that included a statement made by Rev. Father Jerome Thien Thao Bui (marriage celebrant from their wedding on 30/06/2018) dated 15 January 2019 and copies of a legal and religious marriage certificates.

17. In support of the review application the sponsor provided the Tribunal evidence of remittances he has made to the visa applicant, receipts for household items he has purchased to “prepare the matrimonial home”, copy of the sponsor’s taxation returns for the 2021 and 2022 financial years, receipts for the rental of a property in Ho Chi Minh City during his visits in 2018 and 2019, photographs of the parties engagement and wedding as well as other photographs of the parties in various settings with other people, screenshots of messages between the parties, including examples from 2019 and 2020, and medical evidence regarding the sponsor’s recent accident.
18. The sponsor wrote to the Tribunal on 19 November 2020 requesting priority processing due to his health issues and age. With the request he provided a certificate of marriage, and a health summary sheet from his treating doctor. On 24 November 2020 the Tribunal refused the request. On 22 August 2021 the sponsor again requested priority processing and provided a copy of his myagedcare ID card. The request was refused 31 August 2021. A third priority request was sent to the Tribunal via email on 8 December 2021 from the visa applicant and was followed by an email from the sponsor with a psychological report attached. On 22 December 2021 the Tribunal wrote to the sponsor advising the request had been refused. A further request was submitted via email from the sponsor on 24 February 2022. The email referred to the previous psychological report and requested priority processing on medical grounds. The request was refused by the Tribunal on 25 March 2022.
19. On 24 October 2022 a fifth priority request was submitted by the applicant’s newly appointed migration representative. It advised the sponsor had been involved in a motor vehicle accident that has restricted his daily social and physical activities and has caused physical and psychological suffering. Attached were letters from Waratah Private Hospital confirming the sponsor was admitted for rehabilitation, and in support of the visa grant. On 28 October 2022 the Tribunal wrote to the applicant’s representative advising priority processing had been granted.
20. On 12 December 2022 the applicant’s migration representative provided the Tribunal further evidence of remittances made by the sponsor to the visa applicant from 2021 to 2022, payment receipts from Best in Beds, Bing Lee, JF Electronics for household items, and four rental property receipts dated 17 July 2018, 11 September 2018, 15 October 2018 and 8 March 2019, evidence of the sponsor and the visa applicant living together. Screenshots of viber messages from October 2019, and from January and February 2020, and evidence of the sponsor temporary residency application to stay longer in Vietnam was provided. Further photos from the applicant’s engagement, wedding, and miscellaneous photographs were also provided.
21. A further submission provided on 14 December 2022 to the Tribunal contained remittances from the sponsor to the visa applicant from 2018, 2019 and 2021, the sponsor’s tax returns for years 2021 and 2022, rental property receipts of the sponsor and the visa applicant from 30 April 2018, 12 May 2018 and 28 January 2019. Viber screenshots from 2018 providing evidence that the visa applicant is a participant on the sponsors family group chat, and conversations between the visa applicant and the sponsors son, further screenshots from 10 January 2020 to 9 February 2020, and evidence of three consignment documents mailed to the visa applicant from the sponsor. Within the submission were a number of letters provided to the applicants in support of the relationship with no identity documents provided.
22. Evidence of the sponsors passport stamps and travels to Vietnam was provided showing the sponsor travelled to Vietnam from 12 – 30 January 2018, 29 April – 17 July 2018, 11 September – 16 October 2018, 27 January – 8 March 2019, 8 September – 6 October 2019, 10 January – 9 February 2020, 8 April – 8 May 2022, and 29 July – 4 September 2022. Also provided was a report of lost items, showing the sponsor losing his phone while in Vietnam,

an English translation of the Civil Certificate of Marriage, an English translation of the Archbishop Saigon Certificate of Marriage, showing the parties are married.

23. A further submission was provided to the Tribunal on 21 December 2022 containing seven letters in support of the relationship with identity documents provided.

Are the other requirements for a spouse relationship met?

24. Having considered the written and oral evidence provided, I have assessed the various aspects of the parties' relationship as outlined below.

25. Issues of concern

26. In describing the history of the relationship, I told the sponsor that there was inconsistent evidence before me in relation to when the parties first met, and there was also an inconsistency between the information contained within their applications. The sponsor stated that the visa applicant filled in both parts of the application form.
27. The Tribunal put information to him in the manner required by section 359AA of the *Migration Act*. In doing, so, I explained that it was potentially adverse, and it could be the reason or part of the reason I affirm the Department's decision. The information put to the sponsor is that his movement records indicate that he was not in Vietnam at that time the parties claim to have met. The information before me is that the parties met in January 2017 however, in 2017 the only period he was overseas was between 17 March and 28 March 2017.
28. The sponsor responded that it was an honest mistake made by the visa applicant. He recounted that they connected on a dating platform at the end of December – early January 2017 but that they only met face to face in 2018. He explained that he made a number of trips to Vietnam because he was having dental work done there.
29. When the visa applicant gave evidence regarding the timing and manner of the parties first meeting it was consistent with that of the sponsor's and she acknowledged that she inadvertently made an error in the application form.

30. Nature of the persons' commitment to each other

31. Although the Department had concerns regarding the sponsor's previous sponsorship and relationships, I am satisfied with the explanation he provided at hearing. I am also satisfied that the confusion in dates as expressed in the written application and at interview was a genuine mistake. The parties provided consistent oral evidence in relation to their first meeting and how the relationship developed. This accords with written provided by the priest and family members.
32. The parties provided consistent and plausible explanations about the pace at which the relationship developed. I have taken account of the number of visits that the sponsor has made to Vietnam since the parties met. Consistent evidence was provided regarding the parties' plans for the future, in particular, the possibility of the visa applicant working with the sponsor's son and her study in preparation for this.
33. Based on the evidence before me that the parties met and married in 2018, I am satisfied that the applicant and sponsor provide a degree of companionship and emotional support to each other which has helped them through the difficulties of the Covid-19 pandemic when the sponsor financially supported the visa applicant's family. I am satisfied based on the evidence before me that the applicant and sponsor view their relationship as long-term.

34. The evidence of the nature of the persons' commitment to each other indicates that the relationship between the applicant and the sponsor is genuine and continuing, and they have a mutual commitment to a shared life as a married couple to the exclusion of all others.

35. *Financial aspects of the relationship*

36. I am satisfied that the parties have no joint assets and no joint liabilities, although in view of the circumstances of the parties this is not unexpected. I am satisfied that the sponsor lives in his own home and accept the oral evidence that the property is in the name of his three sons. Although it appears that the sponsor has not informed the visa applicant of this, I accept that he has come to this arrangement following the request from his now deceased wife. I am satisfied that when the sponsor stayed in Vietnam, he paid for the rental property in which they stayed together. I am satisfied that although the visa applicant works and earns an income that the sponsor sends her money and that she uses it either for her family, saves some of it and donates some to an aged care facility run by her church. The evidence of the financial aspects of the relationship indicates that the applicant and sponsor are in a genuine and continuing relationship.

37. *Nature of the household*

38. I am satisfied based on the evidence provided that the parties resided together in a rental property during the sponsor's visits to Vietnam and shared joint responsibility for the household. The parties gave consistent evidence regarding the nature of the visa applicant's employment and daily routines. I am satisfied that the parties intend to live in the sponsor's home.
39. Although the evidence is limited as to the nature of the household, I am satisfied that given the fact the parties do not reside in the same country it indicates that they are in a genuine and continuing relationship, that they live together, and not separately and apart, on a permanent basis.

40. *Social aspects of the relationship*

41. The evidence before the tribunal is that the parties have planned and undertaken joint social activities on the occasions of the sponsor's visits to Vietnam.
42. A number of supporting statements were provided from the sponsor's sons and others. I explained at hearing that I could not give them any weight as they were not accompanied by identification documents of the declarants. This was rectified in post-hearing submissions.
43. The supporting statements provided from the sponsor's sons refer to the visa applicant being accepted into the family and that she is part of the family group chats. This is corroborated through the screenshots of messages within the family group chats. The statements also provide a consistent account of when the visa applicant was introduced to the family. The visa applicant gave detailed and consistent descriptions regarding the work and family situations of the sponsor's sons.
44. The evidence of the social aspects of the relationship indicates that the parties have a mutual commitment to a shared life as a married couple to the exclusion of all others, and that their relationship is genuine and continuing.

45. *Overall Findings*

46. Having considered all the evidence, the Tribunal is satisfied that the parties have a mutual commitment to a shared life to the exclusion of all others, they are in a genuine and

continuing relationship and live together or not separately and apart on a permanent basis. There is nothing before the Tribunal to suggest the parties are related by family.

47. On the basis of the above the Tribunal is satisfied that the requirements of s.5F(2) are met at the time the visa application was made and at the time of this decision].
48. Therefore, the visa applicant meets cl.309.211 and cl.309.221.
49. Given the findings above, the appropriate course is to remit the application for the visa to the Minister to consider the remaining criteria for a Subclass 309 visa.

DECISION

50. The Tribunal remits the application for a Partner (Provisional) (Class UF) visa for reconsideration, with the direction that the visa applicant meets the following criteria for a Subclass 309 (Partner (Provisional)) visa:
 - cl.309.211 of Schedule 2 to the Regulations
 - cl.309.221 of Schedule 2 to the Regulations.

Linda Holub
Member

ATTACHMENT - Extract from Migration Regulations 1994

1.15A Spouse

- (1) For subsection 5F (3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5F (2) (a), (b), (c) and (d) of the Act exist.
- (2) If the Minister is considering an application for:
 - (a) a Partner (Migrant) (Class BC) visa; or
 - (b) a Partner (Provisional) (Class UF) visa; or
 - (c) a Partner (Residence) (Class BS) visa; or
 - (d) a Partner (Temporary) (Class UK) visa;the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).
- (3) The matters for subregulation (2) are:
 - (a) the financial aspects of the relationship, including:
 - (i) any joint ownership of real estate or other major assets; and
 - (ii) any joint liabilities; and
 - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and
 - (iv) whether one person in the relationship owes any legal obligation in respect of the other; and
 - (v) the basis of any sharing of day-to-day household expenses; and
 - (b) the nature of the household, including:
 - (i) any joint responsibility for the care and support of children; and
 - (ii) the living arrangements of the persons; and
 - (iii) any sharing of the responsibility for housework; and
 - (c) the social aspects of the relationship, including:
 - (i) whether the persons represent themselves to other people as being married to each other; and
 - (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and
 - (iii) any basis on which the persons plan and undertake joint social activities; and
 - (d) the nature of the persons' commitment to each other, including:
 - (i) the duration of the relationship; and
 - (ii) the length of time during which the persons have lived together; and
 - (iii) the degree of companionship and emotional support that the persons draw from each other; and
 - (iv) whether the persons see the relationship as a long-term one.
- (4) If the Minister is considering an application for a visa of a class other than a class mentioned in subregulation (2), the Minister may consider any of the circumstances mentioned in subregulation (3).